112—127

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 40.

THE COOPER MANUFACTURING COMPANY OF MOUNT VERNON, OHIO, PLAINTIFF IN ERROR,

vs.

JAMES W. FURGUSON AND FRANK HARRISON, PARTNERS AS FURGUSON AND HARRISON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

FILED OCTOBER 8, 1881.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the Circuit Court of the United States for the District of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 10th day of August, 1880, came The Cooper Manufacturing Company, by James A. Lowrie, Esq., its attorney, and filed in said court its complaint, and sued out of said court a writ of summons against John W. Ferguson and Frank Harrison, partners as Ferguson & Harrison.

And the said complaint is in words and figures as follows, to wit:

Complaint.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States for the District of Colorado.

THE "COOPER MANUFACTURING COMPANY" of Mt. Vernon, Ohio, a citizen of the State of Ohio, Plaintiff,
vs.
JOHN W. FERGUSON and FRANK HARRISON, partners doing business under the firm name of Ferguson & Harrison, citizens of the State of Colorado, Defendants. } Complaint.

The plaintiff complains and alleges:

2 I. That the plaintiff is a corporation organized and existing under the laws of the State of Ohio, and, as such, doing business in its corporate name of "Cooper Manufacturing Company," with its principal place of business at Mt. Vernon, in said State of Ohio.

II. That the defendants, the said John W. Ferguson and Frank Harrison, are citizens of and doing business in the State of Colorado, under the firm name of Ferguson & Harrison.

III. That on the twenty-first day of February, A. D. eighteen hundred and eighty, the plaintiff and the defendants entered into a written agreement in words, letters, and figures as follows, viz:

"An agreement, made this 21st day of Feb., 1880, between The Cooper Manufacturing Company of Mt. Vernon, Ohio, of the first part, and Ferguson & Harrison, of Loveland, county of Larimer and State of Colo., of the second part, as follows: The party of the first part, in consideration of the premises hereinafter contained, does promise and agree to sell to the party of the second part the following machinery, to wit: One 14x24, class 25, 50-H. P. stationery engine with governor, hammered-iron shaft, 6,000 lb. fly-wheel, 2 foundation bolts. One tubular boiler, 15′ long and 55″ diameter; shell, C. H. No. IX$\frac{11}{32}$; iron dome, 30x40″; horizontal seams, double-nutted improved boiler front, with two doors, roller and saddle safety valve; grates for burning slack, grate beam, ash door, back
3 arch supports; glass water-*guage*, *guage* cocks, & Union steam *gague*, blow-off, feed, check, & stop valves; steam, hot water, & exhaust pipes; one joint, 12 or 14 feet cold-water-pipe, one coil heater, one No. 20 inspirator; one sheet-iron chimney 26″ diat., 60 ft. of heavy iron with two sets of guys; a complete engine and

boiler ready for fire and water. Also four run of 42-in. O. Q. French burr mill stones, of such grades as the purchaser may select; faced, furrowed, backed, and banded, fitted with balanced boxes and irons set with walnut and chestnut staves; curbs, spindles, steel points, steps, & boxes, drivers, brushes, lighter, screws, levers, hand wheels, silent feeders, spouts; in fact, all irons to make 4-run burrs complete. One 3-run flower bolt and one single-reel flour bolt, reels 18 ft. 32 in., with conveyors & cut-offs and cloths made up for 4 reels of such Nos. as the purchaser may select. One No. 1 dustless warehouse separator. One No. 1 smutter and separator combined, without shaker. One No. 1 double brush scourer. One No. 3 purifier. 2 combined wheat steamers & heaters. One crane hoisting bale & screw pins. One flour packer (Eureka), ¼ & ½ bbls. One p'r 600 lb. scales on trucks. One p'r 40 bu. hopper scales. Heads & feet for 24 in. wheat elevators, & for masonery, flour, & middlings. Elevator for burrs. 5 sets reel lightners. One proof & one red staff. 1 doz. assorted mill picks. One bay track. One set flour scoop. Husk
4 shaft of 4½-in. iron coupled into engine shaft of proper length to drive the mill burrs, & vertical shaft with journal & pulleys for driving the same, with 9-in. leather belting to nine burrs, & 10-in. leather belting to drive vertical shaft, together with all the wrought-turned shafting, turned balanced pulleys, gearing, boxes, machine belts, elevator cups & bolts, and belting to make a complete four-run mill, as described above, and includes the irons for any conveyor required for grain or flour purposes.

Also the manufacturers are to furnish a complete set of plans, erecting and placing the above-named machinery, and to include the machine bolts for the ——, and prepay the freight on all the above described machinery to Chicago, Ills., and they are to furnish good material and good work, a No. 1 job in every particular, and they guarantee the same to perform in a proper manner, the same being set as per plans and operate by a good miller and engineer.

Said machinery to be ready for delivery at the shops of The Cooper Manufacturing Co., Mt. Vernon, Ohio, on the first day of June, 1880, unless prevented by unavoidable accident or strikes of workmen, in which case the same shall be completed as soon thereafter as practicable. The said sale is to be made upon the payment by the second party of the sum of seven thousand ($7,000) dollars, as follows:
5 $1,000.00 cash by April 1st, 1880; $2,000.00 cash by time set for ship't; $4,000.00 cash within 30 days from date of ship't; or $7,000.00 within 10 days from date the machinery arives at Loveland, Col., the last pay't payable at Poudre Valley Bank, Fort Collins, with current rate of exchange on New York.

Said party of the first part agrees to deliver said machinery in good order for transportation on cars at Mt. Vernon, Ohio. In case of any defects in the materials or workmanship of said machinery said Cooper Manufacturing Co. agree to make good such defects at their shops without charge; and should it not perform as well as is customary for machinery of like size and proportions, the second party are to notify and give the first party reasonable notice and chance to make the same perform in a proper manner, provided

notice in writing of such defects shall be given them within 4 monnths from the delivery of said machinery.

It is understood that no warranty or verbal understanding of any kind exists in regard to subject-matter of this contract, other than what is herein expressly stated; that the said party of the first part shall not be liable for any damages on account of such machinery or the subject matter of this contract, unless the claim therefor in writing shall be presented to said party of the first part within
6 4 months from the delivery of said machinery and a reasonable time given to make said machinery good, as before stated.

It is further agreed that the title, ownership, and right of possession of the aforesaid machinery shall be and remain in the party of the first part until the whole amount above provided, of money, is fully paid as above agreed, when the same shall vest in the party of the second part.

In witness whereof the parties hereto have subscribed this agreement, the day and year above written.

(Signed) COOPER M'F'G CO.,
By JOHN COOPER, *Pres.*
(Signed) FERGUSON & HARRISON."

IV. That the plaintiff, immediately after the execution of said agreement and in compliance therewith, commenced the work of manufacturing the machinery described and provided for in said agreement, and continued the said work until stopped by the action of the defendants.

V. That while the plaintiff was doing the work necessary to fulfill its part of the said agreement, and before it was necessary under the terms of the agreement to deliver the said machinery, the defendants, to wit, on the 22d day of March, A. D. 1880, refused to comply with the terms of said agreement, and have ever since refused so to do, and they have refused to pay any money on, or under, or by virtue of the said agreement, although often requested so to do.

7 VI. That by reason of such refusal by said defendants the plaintiff has suffered damage to the amount of three thousand dollars ($3,000.00).

Wherefore the plaintiff prays judgment that the defendants shall pay the plaintiff the sum of three thousand dollars damages and the costs of this suit.

(Signed) JAS. A. LOWRIE,
Att'y for Plaintiff.

Endorsed: No. 524. Circuit court of U. S., district of Colorado. The "Cooper Manufacturing Company" of Mt. Vernon, Ohio, a citizen of the State of Ohio, *vs.* John W. Ferguson and Frank Harrison, partners as Ferguson & Harrison, citizens of the State of Colorado. Complaint. Filed Aug. 10, 1880. (S'd) Edward F. Bishop, clerk. Jas. A. Lowrie, att'y for pl'ff. Post office, Denver, Col.

And the said summons is in words and figures as follows, to wit:

Summons.

8 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In the Circuit Court of the United States for the District of Colorado.

THE COOPER MANUFACTURING COMPANY OF MT. VERNON, OHIO, Plaintiff,
versus
JOHN W. FERGUSON and FRANK HARRISON, partners, &c., as FERGUSON & HARRISON, Defendants.

Complaint filed in the clerk's office, this 10th day of August, A. D. 1881.

The President of the United States of America to John W. Ferguson and Frank Harrison, partners, &c., as Ferguson & Harrison, Greeting:

You, and each of you, are hereby notified that an action has been brought in said court by The Cooper Manufacturing Company of Mt. Vernon, Ohio, plaintiff, against you, as defendants, to recover the sum of three thousand dollars due by you, the said defendants, to the said plaintiff, upon a written contract, as more fully appears from the complaint filed in this cause and to which reference is here made, and for the costs of this suit.

You are hereby required to appear and demur, or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise, within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, for the said sum of $3,000 damages and costs.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court, at the city of Denver, in said district, this 10th day of August, A. D. 1880, and of the Independence of the United States the 105th year.

[SEAL.] (S'g'd) EDWARD F. BISHOP, *Clerk.*

9 *Proof of Service.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

DENVER, COLO., *Aug.* 11, A. D. 1880.

I hereby certify that I received the within writ on the 11th day of August, A. D. 1880, and that I have personally served the same upon John W. Ferguson, one of the said defendants, by delivering to him personally a true copy of the within writ, at the the day and

time as follows: At Fort Collins, county of Larimer, on the 16th day of August, A. D. 1880. As to Frank Harrison, not found.

This writ returned, served as the law directs, this 22d day of November, A. D. 1880.

(Signed) P. P. WILCOX, *Marshal*,
By JOHN J. ELLINGHAM, *Deputy Marshal*.

[Marshal's fees all blank.]

Endorsed: Gen. No. 524. Circuit court of the United States for the district of Colorado. The Cooper Manufacturing Co., plaintiff, *versus* John W. Ferguson *et al.*, partners, &c., defendants. Summons. Filed this 23d day of Nov., A. D. 1880. S'g'd Edward F. Bishop, clerk, by F. W. Tupper, deputy clerk. James A. Lowrie, W. F. Jenneso, of Denver, attorney- for plaintiff.

10 And afterwards and on, to wit, the 16th day of September, A. D. 1880, came the said defendants, by W. S. Decker, Esq., their attorney, and filed in said court and in said cause their answer to the complaint heretofore filed herein. And the said answer is in words and figures as follows, to wit:

Answer.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States for the District of Colorado.

THE COOPER MANUFACTURING COMPANY of Mount Vernon, Ohio, a citizen of the State of Ohio, Plaintiff,
vs.
JOHN W. FERGUSON and FRANK HARRISON, Partners as Ferguson & Harrison, citizens of the State of Colorado, Defendants.
} Answer.

Now come James W. Ferguson, sued as and in the name of John W. Ferguson, and Frank Harrison, by their attorney, and in answer to the complaint herein say:

I. That they admit paragraphs I and II of the said complaint.

II. They deny that on the twenty-first day of February, A. D. 1880, or any other day, the plaintiff and defendants entered into the agreement set forth in paragraph III of said complaint, or any other agreement.

11 III. They deny that the plaintiff at any time commenced or did any work in compliance with the agreement mentioned in its complaint, and deny that plaintiff commenced or did any of the work of manufacturing the machinery described in such agreement.

IV. They deny that plaintiff did any work whatever necessary to fulfill its part of the said agreement.

V. They deny that by reason of their refusal the plaintiff has suffered damage to the amount of three thousand dollars, or any part thereof; and they deny that the plaintiff has suffered damage to the

amount of three thousand dollars, or any part of that sum, by reason of any act or acts of these defendants.

And for a second answer to the said complaint the defendants allege:

I. That the said pretended agreement set forth in the plaintiff's complaint was made and entered into in the county of Larimer, in the State of Colorado, and not elsewhere.

II. That long prior to the time of making the said pretended agreement the plaintiff was, and ever since hath been, a foreign corporation, organized and existing under the laws of the State of Ohio.

III. That when the said pretended agreement was made in Larimer county, State of Colorado, as aforesaid, the plaintiff had not made and filed a certificate signed by its president and secretary, duly acknowledged, with the secretary of State of the State of Colorado, and in the office of the recorder of deeds of the county in which its business was to be carried on, designating the principal place where the business of said corporation shall be carried on in this State, and an authorized agent or agents in this State, residing at its principal place of business, upon whom process may be served.

12

And for a third answer to the said complaint the defendants allege:

I. That the said pretended agreement set forth in plaintiff's complaint was made and entered into in the county of Larimer, and State of Colorado, and not elsewhere.

II. That long prior to the time of making the said pretended agreement at the place aforesaid the plaintiff was, and still is, a foreign corporation, organized and existing under the laws of the State of Ohio.

III. That at the time of making such pretended agreement the plaintiff being a foreign corporation as aforesaid, did not have a known place of business in the State of Colorado, and did not have an authorized agent or agents in the same, upon whom process might be served.

(Signed) W. S. DECKER,
Attorney for the Defendants.

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Endorsed: No. 524. In circuit court of U. S., district of Colorado. The Cooper Manufacturing Company of Mt. Vernon, Ohio, a citizen of the State of Ohio, *vs.* John W. Ferguson and Frank Harrison, partners as Ferguson & Harrison, citizens of the State of Colorado. Answer. Filed Sep. 16, 1880. (S'g'd) Edward F. Bishop, clerk. W. S. Decker, def'ts' att'y. Post office, Denver, Colorado.

And afterwards and on, to wit, the 18th day of October, A. D. 1880, came again the said plaintiffs, by its attorney, and filed in said court and in said cause its demurrer to the answer heretofore filed

herein. And the said demurrer is in words and figures as follows, to wit:

Demurrer to Answer.

UNITED STATES OF AMERICA, *ss:*

In the Circuit Court of the United States for the district of Colorado.

THE COOPER MANUFACTURING COMPANY of Mt. Vernon, Ohio, a citizen of the State of Ohio, Plaintiff, *vs.* JAMES W. FERGUSON (sued as and under the name of John W. Ferguson) and Frank Harrison, partners, doing business under the firm name of Ferguson & Harrison, citizens of the State of Colorado, Defendants.	Demurrer to 2d & 3d Defences.

The plaintiff demurs to the second answer to the plaintiff's complaint filed herein, and for cause of demurrer alleges that the said second answer does not state facts sufficient to constitute a defense to the cause of action alleged in the said complaint.

The plaintiff demurs to the third answer to the plaintiff's complaint filed herein, and for cause of demurrer alleges that the said third answer does not state facts sufficient to constitute a defense to the cause of action alleged in said complaint.

(Signed) JAS. A. LOWRIE,
Att'y for Pl'ff; Post Office, Denver, Colo.

Endorsed: No. 524. In circuit court of the United States, district of Colorado. The Cooper Manufacturing Company of Mt. Vernon, Ohio, a citizen of the State of Ohio, plaintiff, *vs.* John W. Ferguson & Frank Harrison, partners as Ferguson & Harrison, citizens of the State of Colorado, defendants. Demurrer to 2d & 3d answers. Filed Oct. 18, 1880. (S'd) Edward F. Bishop, clerk. Jas. A. Lowrie, att'y for pl'ff; P. O., Denver.

And afterwards and on, to wit, the 22d day of November, A. D. 1880, the same being one of the regular juridical days of the October term, A. D. 1881, of said court—present, the Honorable
15 Moses Hallett, district judge—the following proceeding, was had and entered of record in said court and in said cause, to wit:

Order—Complaint Dismissed.

THE COOPER MANUFACTURING COMPANY *vs.* JOHN W. FERGUSON and FRANK HARRISON, partners, &c., as Ferguson & Harrison.	For Damages.

At this day comes the said plaintiff, by J. A. Lowrie, Esq., its

attorney, and the said defendants, by E. P. Jacobson, Esq., their attorney, also come.

And thereupon the said plaintiff here in open court saith that it will and doth abide by its said demurrer to the second and third paragraphs of the said answer.

Wherefore, on motion of the said defendants, it is ordered by the court that this cause stand dismissed; that the said defendants go hence hereof without day, and have and recover of and from the said plaintiff their costs by them, in this behalf laid out and expended, to be taxed, and have execution therefor.

And thereupon and on the same day, to wit, the 22d day of November, A. D. 1880, the following further proceeding was had
16 and entered of record in said court and in said cause, to wit:

Certificate of Division of Opinion.

THE COOPER MANUFACTURING COMPANY
vs.
JOHN W. FERGUSON and FRANK HARRISON, partners, doing business under the firm name and style of Ferguson & Harrison. } For Damages.

At this day comes again the said plaintiff, by J. A. Lowrie, Esq., its attorney, and files herein the certificate of division of opinion herein between the judges. And the said certificate of division of opinion is in words and figures as follows, to wit:

THE COOPER MANUFACTURING COMPANY
vs.
JAMES W. FERGUSON (sued as and in the name of John W. Ferguson) and FRANK HARRISON, partners as Ferguson and Harrison.

State of the Pleadings.

This is an action commenced by filing a complaint upon a contract dated the 21st day of February, A. D. 1880, made between the plaintiff and the defendants, whereby the plaintiff agreed to sell certain machinery in said contract described, and to deliver the same to the defendants, the said machinery to be deliverd at Mt. Vernon, in the State of Ohio, and the said defendants agreed to pay to the plaintiff the price stipulated for in said contract.

17 The defendants, among other answers, pleaded as follows, to wit: "And for a second answer to the said complaint the defendants allege—

I. That the said pretended agreement set forth in the plaintiff's complaint was made and entered into in the county of Larimer, in the State of Colorado, and not elsewhere.

II. That long prior to the time of making the said pretended agreement the plaintiff was, and ever since hath been, a foreign corporation, organized and existing under the laws of the State of Ohio.

III. That when the said pretended agreement was made in Larimer county, State of Colorado, as aforesaid, the plaintiff had not

made and filed a certificate signed by its president and secretary, duly acknowledged, with the secretary of State of the State of Colorado, and in the office of the recorder of deeds of the county in which its business was to be carried on, designating the principal place where the business of said corporation shall be carried on in this State, and an authorized agent or agents in this State, residing at its principal place of business, upon whom process may be served."

"And for a third answer to the said complaint the defendant alleges—

I. That the said pretended agreement set forth in plaintiff's complaint was made and entered into in the county of Larimer,
18 in the State of Colorado, and *and* not elsewhere.

II. That long prior to the time of making the said pretended agreement at the place aforesaid, the plaintiff was, and still is, a foreign corporation, organized and existing under the laws of the State of Ohio.

III. That at the time of making such pretended agreement, the plaintiff, being a foreign corporation as aforesaid, did not have a known place of business in the State of Colorado, and did not have an authorized agent or agents in the same upon whom process might be served."

To each of which said second and third answers the plaintiff demurs and the defendants join in the demurrer.

The case coming on to be argued at this term, it occurred as a question whether the tenth section of article XVI of the constitution of the State of Colorado and the twenty-third section of an act of the General Assemby of the State of Colorado, passed in the year A. D. 1877, entitled "An act to provide for the formation of corporations," were, or either of them was, under all the circumstances stated and the various acts passed by the Legislature of the State of Colorado, a bar in this action.

Sect. 10 of article XVI of the constitution of the State of Colorado is as follows, to wit, "No foreign corporation shall do any business in this State without having one or more known places
19 of business and an authorized agent or agents in the same upon whom process may be served."

The said twenty-third section of the act of the General Assembly of the State of Colorado, passed in the year A. D. 1877, entitled "An act to provide for the formation of corporations," is as follows, to wit:

"SEC. 23. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions, and duties which are or may

be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

On which question the opinion of the judges were opposed.

Whereupon, on a motion of the plaintiff, by his counsel, that the point upon which the disagreement has happened may during the term be stated, under the direction of the judges and certified under the seal of the court to the Supreme Court of the United States of America to be finally decided, it is ordered that the foregoing state of the pleadings and the following statement of facts, which is made under the direction of judges, be certified according to the request of the plaintiff, by his counsel, and the law in that case made and provided, to wit:

First. That the Cooper Manufacturing Company is a corporation organized and existing under the laws of the State of Ohio, and, as such, doing business in its corporate name of Cooper Manufacturing Company, with its principal place of business at Mt. Vernon, in the State of Ohio.

Second. That the defendants are citizens of the State of Colorado.

Third. That on the 22d day of February, A. D. 1880, the plaintiff and the defendants entered into a contract, wherein it was provided that the plaintiff should furnish to the defendants certain machinery to be delivered to the defendants in good order for transportation on cars at Mt. Vernon in the State of Ohio and not elsewhere, and that the defendants were to pay the price for said machinery agreed upon in said contract.

Fourth. That said contract was made and entered into in Larimer county, in the State of Colorado.

Fifth. That the plaintiff filed in the complaint in this cause on the tenth day of August, in the year of our Lord one thousand eight hundred and eighty.

(Signed) GEO. W. McCRARY. [SEAL.]
(Signed) MOSES HALLETT. [SEAL.]

And afterwards and on, to wit, the 3d day of October, A. D. 1881, came again the said plaintiff, by its attorney aforesaid, and filed in said court and in said cause their bond in appeal to the Supreme Court of the United States, and sued out of said court a writ of error and citation to the said Supreme Court. And the said bond in appeal is in words and figures as follows, to wit:

Appeal Bond.

Appeal Bond, U. S. —— Court, Colorado.

THE UNITED STATES OF AMERICA, *District of Colorado:*

Know all men by these presents, that we, "The Cooper Manufacturing Company" of Mt. Vernon, Ohio, as principal, and Charles Cooper and Alfred R. McIntire, as sureties, are held and firmly bound unto James W. Ferguson and Frank Harrison, partners as Ferguson and Harrison, in the full and just sum of five hundred ($500.00) dollars, to be paid to the said Ferguson and Harrison; to

which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 24th day of September, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas, lately, at the October term, A. D. 1880, of the circuit of the United States for the district of Colorado, in a suit pending in said court between The Cooper Manufacturing Company of Mt. Vernon, Ohio, a citizen of the State of Ohio, plaintiff, and James W. Ferguson and Frank Harrison, partners as Ferguson and Harrison, citizens of the State of Colorado, defendants, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James W. Ferguson and Frank Harrison, citing and admonishing them to be and appear at a Supreme Court of the United States to be held at Washington city, D. C., on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said The Cooper Manufacturing Company shall prosecute said writ to effect, and answer all damages and costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.]	(Signed)	COOPER M'F'G CO.,	[SEAL.]
		G. J. COOPER, *Pres.*	[SEAL.]
	(Signed)	C. COOPER.	[SEAL.]
	(Signed)	ALFRED R. McINTIRE.	[SEAL.]

Approved October 3d, 1881.

(Signed) MOSES HALLETT, *Judge.*

23 *Justification.*

THE UNITED STATES OF AMERICA, } ss:
State of Ohio, Knox County, }

Charles Cooper and Alfred McInter, sureties on the within bond, being each first duly sworn, depose and say that they are each worth in cash the sum below set opposite their names respectively, that is to say: as to Charles Cooper, over fifty thousand dollars; as to Alfred R. Intire, over two thousand dollars; over and above all their just debts and liabilities, and in property subject to levy and sale upon execution.

(Signed) ALFRED R. McINTIRE.
(Signed) C. COOPER.

Subscribed and sworn to before me, at Mt. Vernon, O., this 24th day of September, A. D. 1881.

[SEAL.] (S'g'd) SAMUEL J. BRENT,
Clerk of the Court of Common Pleas of Knox County, Ohio.

Endorsed: Gen. No. 524. Circuit court of the United States, district of Colorado. The Cooper Manufacturing Company of Mt. Vernon, Ohio, plaintiff in error, *vs.* James W. Ferguson and Frank Har-

rison, partners as Ferguson & Harrison. Appeal bond, $500.00. Filed in the circuit court U. S., this 3d day of October, A. D. 1881. (S'g'd) Edward F. Bishop, clerk.

And the said writ of error is in words and figures as follows, to wit:

Writ of Error.

24 Writ of Error to the Circuit Court U. S. District of Colorado.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between The Cooper Manufacturing Company of Mt. Vernon, Ohio, and James James W. Furguson and Frank Harrison, partners as Furguson & Harrison, a manifest error hath happened, to the great damage of the said The Cooper Manufacturing Company of Mt. Vernon, Ohio, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the tenth day of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3d day of October, in the year of our Lord, one thousand eight hundred and eighty-one, and of the Independence of the United States the 106th year.

EDWARD F. BISHOP, *Clerk.*

Allowed by—

MOSES HALLETT, *Judge.*

25 *Return.*

THE UNITED STATES OF AMERICA, } ss:
District of Colorado, }

In obedience to the command of the within writ, I herewith transmit to the Honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this —— day of Oct'r, A. D. 1881.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Endorsed: Gen. No. 524. Circuit court of the United States. The Cooper Manufacturing Company of Mt. Vernon, Ohio, plaintiff in error, *vs.* James W. Furguson and Frank Harrison, partners, as Furguson & Harrison. Writ of error to circuit court U. S., district of Colorado. Filed in circuit court of the U. S., this 3d day of Oct'r, A. D. 1881. Edward F. Bishop, clerk.

And the said citation is in words and figures as follows, to wit:

Citation.

26 Citation U. S. Supreme Court.

THE UNITED STATES OF AMERICA, *District of Colorado:*

The United States of America to James W. Furguson and Frank Harrison, partners as Furguson & Harrison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington city, D. C., on the tenth day of October next, pursuant to a writ of error filed in the celrk's office of the circuit court of the United States, district of Colorado, wherein The Cooper Manufacturing Company of Mt. Vernon, Ohio, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behaif.

Witness the Honorable Moses Hallett, judge of the district court of the United States for the district of Colorado, this 3d day of October, in the year of our Lord one thousand eight hundred and eighty-one.

MOSES HALLETT, *Judge.*

27 *Proof of Service.*

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

On this third day of October, A. D. 1881, personally appeared James A. Lowrie, before me, the subscriber, a clerk of the circuit court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to W. S. Decker, Esq., attorney for defendants in error, on this third day of October, A. D. 1881.

JAS. A. LOWRIE.

Sworn to and subscribed before me, this 3d day of Oct'r, A. D. 1881.

[SEAL.] EDWARD F. BISHOP,
Clerk Dist. Court U. S.

[Endorsed:] Gen. No. 524. Circuit court of the United States, district of Colorado. The Cooper Manufacturing Company of Mt. Vernon, Ohio, plaintiff in error, *vs.* James W. Furguson and Frank Harrison, partners as Furguson & Harrison, defendant- in error.

Citation. Filed in circuit court of the U. S., this 3d day of Oct'r, A. D. 1881. Edward F. Bishop, clerk. J. A. Lowrie, attorney for plaintiff in error. Received service.

28 UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Edward F. Bishop, clerk of the circuit court of the United States for the district of Colorado, sitting at Denver, do hereby certify the above and foregoing to be a true, perfect, and complete transcript and copy of the complaint, summons, answer, demurrer to answer, certificate of division of opinion, appeal bond, and all orders of court had and entered of record heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending. wherein The Cooper Manufacturing Company was plaintiff and James W. Ferguson and Frank Harrison, partners, etc., were defendants, as fully and completely as the same still remain on file or of record in my office.

In testimony to the above, I do hereunto sign my name and affix the seal of said court, at Denver, in said District, this third day of October, A. D. 1881.

[SEAL.] EDWARD F. BISHOP, *Clerk*,
By WM. E. ROGERS, *Deputy.*

Cost of transcript:

57 fol., @ 10 c. ------	$5 70
Certificate ----------	35
	$6 05

Paid by Jas. A. Lowrie.

Endorsed on cover: Colorado C. C. U. S. No. 40. The Cooper Manufacturing Company of Mt. Vernon, Ohio, plaintiff in error, *vs.* James W. Furguson and Frank Harrison, partners as Furguson & Harrison. Filed October 8, 1881.

113-727

Office Supreme Court U. S.
FILED.
OCT 14 1884
JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

NO. 40.

THE COOPER MANUFACTURING COMPANY

vs.

JAMES W. FURGUSON & FRANK HARRISON,

Partners as FERGUSON & HARRISON.

STATEMENT OF THE CASE.

WALTER H. SMITH,
Attorney for Plaintiff in Error.

WASHINGTON, D. C.:
R. O. POLKINHORN & SON, PRINTERS,
1884.

Citation. Filed in circuit court of the U. S., this 3d day of Oct'r, A. D. 1881. Edward F. Bishop, clerk. J. A. Lowrie, attorney for plaintiff in error. Received service.

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vs.

JAMES W. FURGUSON & FRANK HARRISON,

Partners as FERGUSON & HARRISON.

STATEMENT OF THE CASE.

WALTER H. SMITH,
Attorney for Plaintiff in Error.

WASHINGTON, D. C.:
R. O. POLKINHORN & SON, PRINTERS,
1884.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 40.

THE COOPER MANUFACTURING COMPANY

vs.

JAMES W. FURGUSON & FRANK HARRISON, PARTNERS AS FURGUSON AND HARRISON.

Statement of the Case.

This is an action brought by the Cooper Manufacturing Company to recover $3,000 damages for a breach of contract on the part of the defendants, and comes to this Court on a certificate of division of opinion between the Judges of the Circuit Court of Colorado.

The facts in the case are briefly as follows:

First. The Cooper Manufacturing Company is a corporation organized and existing under the laws of the State of Ohio, and, as such, doing business in its corporate name of the Cooper Manufacturing Company, with its principal place of business at Mt. Vernon, in the State of Ohio.

Second. The defendants are citizens of the State of Colorado.

Third. On the 22d day of February, A. D. 1880, the plaintiff and the defendants entered into a contract wherein it was provided that the plaintiff should furnish to the

defendants a steam engine and other machinery, to be delivered to the defendants in good order for transportation on cars at Mt. Vernon, in the State of Ohio, and not elsewhere; and that the defendants were to pay the price for said machinery agreed upon in said contract.

Fourth. Said contract was made and entered into in Larimer County, in the State of Colorado.

The defendants, in their answer, set up the defense that the plaintiff, being a foreign corporation, had not complied with the requirements of the 10th Section, Article 16, of the Constitution of the State of Colorado, and with the provisions of Section 23 of the Act of the General Assembly of the State, passed in 1877.

The plaintiff demurred to this answer as a defense, and the cause was dismissed. In the Circuit Court there was a division of opinion as to the question, and the case comes here on a certificate of such division.

Assignment of Errors.

The Court below erred in dismissing the case and rendering judgment against the plaintiff for costs.

Argument.

Section 10 of Article 16 of the Constitution of the State of Colorado is as follows:

"No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served."

The Act of the Assembly of 1877 is as follows:

"Sec. 23. Foreign corporations shall, before they are authorized or permitted to do any business in the State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the Recorder of Deeds of the county in which such business is carried on designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business, upon whom process may be served, &c."

The sole question in the case, therefore, is whether or not the making of this single contract by a foreign corporation with citizens of the State of Colorado, is doing business in the State in such a sense as to bring it within the meaning and spirit of these provisions of law and render the contract void.

I think that the making of such a single and isolated contract is not doing business in the State in the sense contemplated by the foregoing provisions. The very language of the clause of the constitution and the act of the State Assembly, renders it manifest that they contemplate and apply to those cases where foreign corporations locate within the State and commence to carry on a continued and regular business within the State.

The constitution of the State requires that foreign corporations shall have one or more *places* of business; the act of the Assembly requires that foreign corporations, before doing any business in the State, shall file a certificate signed by the President and Secretary, in the office of the Secretary of State, and in the Recorder's office of each county, "*in which such business is carried on*," and the appointment of an authorized agent or agents *resident at its principal place of business*, &c.

If it were the intention to require every foreign corporation which might desire to make a single contract with or sell

goods to a citizen of the State, to comply with these requirements, it would be an effectual bar to all intercourse between such parties. Consider what each foreign corporation would be required to do before it could make a contract in the State, even though it were to be performed and executed outside of the State. It must have a place of business, one or more authorized agents, a certificate on file in the Secretary of State's office and in the Recorder's office, and the agent must be a *resident* of the place where the business is carried on in the State. It is manifest that such a course would be an effectual bar to all trade between citizens and foreign corporations. It would prevent any incorporated foundry from disposing of a single engine or any machinery for the working and development of the mines, in which the greater portion of the wealth of the State is invested. It would prevent any manufacturing company of cloths from selling to any merchant in the State of Colorado on any other terms than cash, because he would know that the purchaser, after coming into possession of the goods, could at once repudiate the contract as null and void. It would prevent an incorporated clock company from selling, on credit in the State, a single clock, or a watch company from selling a single watch, by means of the risk it would run of losing the article sold. These provisions of the law were made for the protection of the citizens of the State, and not for their oppression, as would manifestly be the case if this court were to decide that they prohibited all trading or contracting with corporations of other States, and that all contracts made were void.

The more reasonable interpretation is that the above provisions apply only to corporations of other States which come into the State of Colorado, with the intention of carrying on the business for which they were incorporated; which intend to engage in trade or business with the citizens of the State; which expect to incur liabilities to citi-

zens as a class, and should therefore be amenable to the laws of the State, and be suable in the courts of the State. Any other interpretation of the provisions above referred to, "the laws of the State of Colorado would prevent single transactions between foreign corporations and its citizens.

The true principle seems to be settled by the authorities that performance of a single isolated act, such as the making of a single contract, does not constitute or amount to doing business within the State within the meaning of such legal provisions as those now under consideration. In the case of *Potter* vs. *The Bank of Ithica*, 5 Hill, 491, this point is decided. The charter of the bank provided that its operations of account and deposit should not be carried on elsewhere than in the village of Ithica. The cashier discounted a note at the City of New York for the purpose of securing a demand due the bank. The court held that the note was valid, and that the restriction in the charter related only to the customary and permanent business operations of the bank, not to an isolated tranaction like the one in question.

In the case of *Graham* vs. *Hendrick*, 22 La. Ann. Rep., 523, the court held that the purchase of a lot of cotton by a railroad company was not affected by the prohibitions of the law providing that "no corporation shall engage in mercantile or agricultural business, &c.," and that the clause of the act referred only to the buying and selling of articles of merchandises as an employment, &c.

Sugdan vs. *Morris Canal and Banking Co.*, 6 Hill, 217;

Steam Navigation Co. vs. *Weed*, 17 Barb., 378.

There are a number of cases which have been decided under statutes somewhat similar to the one in question, but they contain an element entirely different from the one under consideration. They are most of them acts relating to insurance companies, and evidently contemplate the exist-

ence of an agent of the corporation at the place where the business is done.

In re Comstock, 3 Sawyer, 223;
Williams vs. *Cheeny*, 3 Gray, 215;
Nat. M. F. I. Co. vs. *Pursell*, 10 Allen, 232;
Aetna Ins. Co. vs. *Harvey*, 11 Wis., 412.

This is the case in 3d Sawyer *supra*, the 8th section of the act of October 24, 1884, which was the one under consideration provided that "a foreign corporation, before transacting business in the State must duly execute and acknowledge a power of attorney and cause the same to be recorded in the county clerk's office of *each county where it has a resident agent.*"

The case is imperfectly reported, but the decision must have rested upon the default of the bank in not complying with the law when it had a resident agent.

In this and like cases it is but reasonable that some one should be appointed, upon whom process might be served as and for the corporation.

The construction of the constitution and statute of Colorado upon this point, is an open question in the supreme court of that State. The only case upon the subject, in that court, is *Utley* vs. *The Clark Gardner Silver Mining Co.*, 4 Col., 369.

The company brought an action of trespass against the defendant for entering upon its mining claim and carrying off its ore. The court held that the action could be maintained, and that bringing a suit was not doing business in the State within the meaning of the constitution and law.

The court says: "By the exercise of the corporate powers it carries on its corporate business in the ordinary meaning of the term. By their exercise it establishes its business relations, assumes obligations, and acquires rights."

This case must be decided upon the construction that should be given to the peculiar phraseology of the constitution and law of Colorado. The court will observe that the language is essentially different from that used in any of the other States.

An interpretation should be given which will be reasonable, and work no injustice either to the citizen or corporation.

Is it reasonable to say, that a single transaction is doing business, and thus ignore the time honored maxim *lex de minimis non curat?*

Is it reasonable to adopt a construction which would prevent a foreign corporation owning real estate in the State, from bringing an action to recover the rents that had accrued to it and remained unpaid?

Let me put a case. Suppose that the Cooper Manufacturing Company, which carries on the business of building steam engines and like machinery, should receive in payment for some of its manufactured articles a valuable diamond, and one of its agents, while traveling through the State of Colorado, should sell that diamond, on credit, for ten thousand dollars, to some one of the many who suddenly become rich in that State, is it possible that it could not recover because it had not filed the certificate and appointed the agent referred to in the constitution and law?

It certainly could not if the words "any business," are to receive the narrow construction which I am contending against.

I ask that the judgment of the court below be reversed.

WALTER H. SMITH,
Att'y for pl'tiff in error.

113-727

FILED
JAN 3 1885

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 40.

THE COOPER MANUFACTURING COMPANY,

PLAINTIFF IN ERROR,

vs.

JAMES W. FERGUSON AND FRANK HARRISON,

(PARTNERS AS FERGUSON & HARRISON,)

DEFENDANTS IN ERROR.

ARGUMENT OF DEFENDANTS IN ERROR.

THOMAS M. ROBINSON,
Attorney for Defendants in Error.

FORT COLLINS, COLO.:
THE COURIER BOOK AND JOB PRINT.
1884.

In the Supreme Court of the United States.

October Term, 1884.

No. 40.

THE COOPER MANUFACTURING COMPANY,
PLAINTIFF IN ERROR,
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(PARTNERS AS FERGUSON & HARRISON,)
DEFENDANTS IN ERROR.

ARGUMENT OF DEFENDANTS IN ERROR.

It will be seen from the brief, but very fair and candid statement of the case by the counsel for the plaintiff in error, that the question presented by the record is as to the validity of a contract made in Colorado by a foreign corporation, without having first complied with the requirements of the law of that State in relation to such corporations. We maintain that the making of the contract was prohibited and that the contract, being prohibited, is void. In so doing, we deny no natural right of the plaintiff in error. The law of its creation, having no extra-territorial effect, gave it no right to do business in

other sovereignties. It must dwell in the place of its creation. "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. * * * The whole matter rests in their discretion."

Paul vs. *Virginia*, 8 Wall., 168-181.

Ducat vs. *Chicago*, 10 Wall., 415.

Railroad Co. vs. *Koontz*, 104 U. S., 11.

The policy of the State of Colorado toward foreign corporations is shown by the following constitutional and statutory provisions, to wit:

"No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served." (*Sec.* 10, *Art. XV, Const. Colorado.*)

"SEC. 24 (23.) Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried

on in this State, and an authorized agent or agents in this State residing at its principal place of business, upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions, and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."
* * * (*Gen. Stats. Colo., Sec.* 260, *p.* 186.)

These provisions are prohibitory.

Utley vs. *Clark-Gardner L. M. Co.*, 4 Colo., 369.

The prohibition contained in Sec. 10, of the Constitution *supra*, is express, while a prohibition is implied from Sec. 24 *supra*, which authorizes or permits business to be done by a foreign corporation only upon its first complying with the prescribed conditions.

It is said by the learned counsel for the plaintiff in error "that the making of such a single and isolated contract is not doing business in the State in the sense contemplated by the foregoing provisions." If the corporation in making such a contract is not doing business, what is it doing? But the theory of the plaintiff seems to be that the making of an occasional contract does not violate the prohibition and that the act must be of such frequent recurrence as to have become habitual or chronic before the law can afford or apply a remedy. The position is untenable. There is nothing in the language of these provisions to imply that the making of a single contract is not doing "any business." It cannot be limited in its application and applied only "to those cases where foreign corporations locate within the State and commence to carry on a continued and regular busi-

ness within the State," because the intent of the lawmakers was evidently to require that such corporation should, before it could do *any* business, put itself in a position to be served with process from the local courts in any action growing out of such business, thereby relieving the citizen of the hardship of pursuing his rights in distant jurisdictions. The hardship is none the less oppressive upon the citizen from the fact that the contract upon which his cause of action has accrued, may be the only one made in the State by such corporation. It was to protect the citizens of Colorado from such hardship that the above provisions of the constitution and statute were adopted and enacted, and they must fall far short of their purpose if they be so construed as to apply to a few only of the vast number of foreign corporations ready to invade the State, many of which are known to be unreliable and litigious.

Complaint has been made by the plaintiff in error, of the hardship of being required to comply with these statutory requirements before it could make a contract. But it has no right to complain. It is only by grace of the State of Colorado, that it may do any business act within that State under any circumstances or upon any conditions. It is true that in the absence of anything in the laws or policy of that State showing the contrary, its consent to the doing of such business would be presumed, but "when the interest or policy of any State, require it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end."

Bank of Augusta vs. *Earle*, 13 *Pet.*, 519-590.

Our State has declared its will in unmistakable terms; it has restricted the rule, so that only those foreign corporations that first comply with the prescribed conditions and requirements have authority or *power* to do any business within its borders.

That the making of this contract was doing business, within the meaning of our prohibitory provisions, there can be no doubt, unless the general terms, "any business," be construed most strictly, and the most narrow construction adopted. We hold that the language of those provisions is so plain and free from ambiguity as to leave no room for construction; but, if the inquiry is made as to whether it shall be construed strictly or liberally, we submit that it should receive a liberal construction. It must be so construed, in order to harmonize with other provisions *in pari materia*. A subsequent section in the same Act of the General Assembly is as follows:

"SEC. 26 (25). A failure to comply with the provisions of Sections 23 (24) and 24 (25) of this Act shall render each and every officer, agent and stockholder of any such corporation, so failing herein, jointly and severally personally liable on any and all contracts of such company made within this state during the time that such corporation is so in default."

(*Gen. Stats., Colo., Sec.* 262, *p.* 187.)

By this section, a penalty is imposed for the making of *any contract.*

"If the statute imposes a penalty upon the act done, this will make the contract void in like manner as if it were in terms prohibited, because a penalty implies a prohibition."

Miller vs. *Post,* 1 Allen, 434–435.

"Whenever an act is made subject to a penalty by statute, it is, of course, considered as prohibited and forbidden."

Allen vs. *Hawks*, 13 Pick., 82.
Ætna Ins. Co. vs. *Harvey*, 11 Wis., 394.
Lemon vs. *Grosskopf*, 22 Wis., 447.
Melchor vs. *McCarty*, 31 Wis., 252.
Thorne vs. *Travelers' Ins. Co.*, 80 Penn. St., 15.

Now, as the prohibition which is implied from the provisions of Section 26, *supra*, is against the making of *any contract* (which may certainly be a single and isolated one), and as this section is a part of the same Act as Section 24, it must be evident that the intent of the lawmakers was that the prohibitions implied from each should be co-extensive; and it follows that if a strict construction would so limit the operation of Section 24 as to make it fall short of that implied in Section 26, it should not be applied. Again, Section 24 should receive a liberal construction, because that is the statutory rule.

"SEC. 3. All general provisions, terms, phrases and expressions, used in any statute, shall be liberally construed, in order that the true intent and meaning of the General Assembly may fully be carried out."
(*Gen. Stat., Gen. Sec.* 3143, *p.* 921.)

The general terms, "any business," contained in the foregoing constitutional and statutory provisions, liberally construed, include the making of a single contract.

A large number of cases have been adjudged under substantially the same statutory provisions, in other States, and it

is believed the different Courts have always arrived at the same conclusion—that a contract made by the foreign corporation in the State, without first having complied with the conditions of the statute permitting it to do business, is void.

In re Comstock (3 *Sawyer*, 218,) the question arose upon the Statute of Oregon, which is substantially the same as our Act, and was discussed so fully by the learned District Judge as to leave little room for further argument. The Court held the contract made in Oregon by the foreign corporation, before a compliance with the statutory requirements, to be void. This case is cited with approval by the Supreme Court of Colorado in *Utley* vs. *Clark-Gardner L. M. Co.*, 4 Colo., 369, in discussing the foregoing provisions of the Constitution and Statutes of Colorado. The opinion of the Colorado Court in *Utley's* case shows clearly the view they entertain—that the doing of business by the foreign corporation is prohibited, except upon the performance of conditions precedent. The right of the corporation to sue was upheld, because it was *not* doing business within the meaning of the prohibitory provisions, as they define the terms employed; but their definition does include the exercise of corporate power to contract.

The Oregon statute was again considered in *Bank of British Columbia* vs. *Page*, 6 Oregon, 431, and the same conclusion reached by the Supreme Court of that state as in the *Comstock* case, *supra*, and the opinion of Deady, J., in the last-mentioned case adopted as their own. In *The Cincinnati M. H. A. Co.* vs. *Rosenthal*, 55 Ills., 85, it was held that an action could not be maintained upon a promissory note taken.

The same conclusion is reached in *Ætna Ins. Co.* vs. *Harvey*, 11 Wisc., 494. In Pennsylvania, the same doctrine prevails (*Thorne* vs. *Traveler's Ins. Co.*, 80 Penn. St., 15). It is a settled law in Massachusetts (*Williams* vs. *Cheney*, 3 Gray, 215), and it is maintained in *Paul* vs. *Virginia*, 8 Wall., 168.

It may be observed, here, that in none of these cases was it made to appear that the contract in question, in each of them, was other than a single and isolated transaction.

That the statutes considered in some of these cases were in relation to insurance companies is a matter not affecting the authority of these judgments. The statutes were substantially the same as our own. In some, the restriction related to foreign insurance companies; in ours, it applies to foreign corporations generally, which is the only difference.

The cases cited by the counsel for the plaintiff in error are so clearly not in point that we will not enter upon a discussion of the distinction between the points decided in those cases and the one under consideration, nor as to their weight as authorities.

The case put by the learned counsel is not apt. It embraces facts and elements not in this case. It supposes that the man who suddenly became rich in Colorado had purchased a valuable diamond for which he refused to pay, but which he proposed to keep. It may well be that the corporation, as well as the man of suddenly-acquired wealth, could treat the *agreement* as an absolute nullity,

which it certainly would be, and bring its action to recover the diamond. The whole business transaction, being null, no title or right of possession would pass. In the case under consideration, the defendants have received nothing. Instead of showing the bad faith involved, in keeping a benefit and refusing to pay the price therefor, these defendants in error, finding that the contract had been made in violation of law, rescinded it (see fourth allegation of complaint, page three of the record,) without waiting until the benefit should be received.

But to suppose the case put is to suppose a condition of things requiring the law to call a halt. A corporation created for the purpose of building steam engines and like machinery in Ohio, posing as a diamond merchant in Colorado! There would be an instant inquiry at the Secretary's office for the name of an authorized agent of such company, "upon whom process may be served."

In conclusion, it is submitted that the making of the contract was prohibited by the laws of the State of Colorado, where it was made; that the contract is unlawful and void, and that the judgment of the Court below should be affirmed.

Thomas M. Robinson

Attorney for Defendants in Error.

113-727

JAN 16 1885
JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE COOPER MANUFACTURING COMPANY
vs.
FERGUSON & HARRISON.
No. 40.

Reply to the brief of Defendants in Error.

WALTER H. SMITH,
Att'y for Pl'ff in Error.

R. O. Polkinhorn & Son, Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1884.

THE COOPER MANUFACTURING COMPANY
vs.
FERGUSON & HARRISON.
No. 40.

Reply to the brief of Defendants in Error.

I desire to call attention of the court to those authorities cited by the counsel for defendants in error which are not contained in my brief. They are as follows:

Aetna Ins. Co. vs. *Haney*, 11 Wis., 394.

This was an action on a note given for a premium of insurance.

The contract was made in Wisconsin, between an agent in the State at Sheboygan and the plaintiff. The agent had not complied with the statute. He had not procured a statement under oath of the President and Secretary of the Company, showing

the amount of capital of the company, &c., and filed the same with the Secretary of State.

The only question made before the Court by the plaintiff in error was, that inasmuch as the statute did not say that the policy or note issued in violation of its provisions was void, the plaintiff could recover.

But the Court held that a contract made in violation of a statute was void.

Lemon vs. *Gross-kept*, 22 Wis., 447.

This was an action to recover monies received on the sale of lottery tickets. The statute of the State made it an indictable offense to deal in such tickets. The Court held that the plaintiff could not recover, but it did allow him to recover monies that had been paid over to defendant by another agent with directions to pay the same to plaintiff.

Melchor vs. *McCarty*, 31 Wis., 252.

This was an action to recover the value of spirituous and intoxicating liquors sold on Sunday and without license.

The Court held that the plaintiff could not recover.

The Rising Sun Insurance Company vs. *Slaughter*, 20 Ind., 520.

In this case the question was, whether a policy of insurance, issued in the State of Indiana by an agent of a foreign insurance company in Pennsyl-

vania, was valid when the agent failed to comply with the statute of Indiana, which required him to deposit, in the clerk's office, the power of attorney from the foreign company which authorized him to act as agent, and authority from the company that suits against it might be instituted in the State of Indiana, and service of process made on the agent.

The statute also expressly provided: "That such corporations shall not enforce by suits in the courts of this State, any contracts made by such agents before they shall have complied with said statute."

The Court held the policy void.

Thorne vs. *Travellers Insurance Company*, 80 Penn. Stat., 15.

This was an action on a bond given by Thorne, with the other defendants below as his sureties, conditioned that he should pay over all monies received by him as agent of the Travellers' Insurance Company.

It appeared that he had acted as agent in the State of Pennsylvania for the company which was a foreign company; that he had at various times, during an interval of several months, received monies for the company amounting to $3,877.21, and that he had not complied with the statute requiring the agent to file with the auditor general the statement required by law. The Court held that the company could not recover.

The *Cincinnati M. H. A. Co.* vs. *Rosenthal*, 55 Ill., 85.

This was an action on a note given for stock of the company and premium.

There was a special plea which was demurred to and the demurrer sustained, and the appeal was prosecuted to reverse the ruling upon the demurrer.

The special plea set out, among other things, that the appellants were an assurance company, created under the laws of Ohio, for the purpose of insuring the health of persons against personal injury or disability; that, at the time tbe note was given, appellants were an insurance company under the laws of Ohio, *and had come into this State to transact business as such*, and had not previous to the execution of said note furnished the Auditor of the State with the statement of the condition and affairs of the company under oath, &c.

The court held, the note void.

Roche vs. *Ladd*, 1 Allen, 436.

This was an action to recover the amount of two promissory notes given for premiums of insurance, payable to the order of the Western Insurance Company of Philadelphia.

The defence was that the company was doing business in Massachusetts, *through an agent*, in violation of law.

The question in the case was whether the party through whom the business was done was in fact an agent of the company.

The court held that he was, and gave judgment for the defendant.

Bank of British Columbia vs. *Page*, 6 Oregon, 432.

This was an action to foreclose a mortgage given to secure a promissory note made to the bank, which was a foreign corporation incorporated by the laws of the Kingdom of Great Britain.

The 8th section of the act of October 21, 1864, provided as follows:

> "A foreign corporation, before transacting business in this State, must duly execute and acknowledge a power of attorney, and cause the same to be recorded in the county clerk's office of each county where it has a resident agent, which power of attorney so long as such company *shall have places of business in the State*, shall be irrevocable, except by the substitution of another qualified person for the one mentioned therein, as attorney for such company."

The next section provided, that such power of attorney shall appoint some citizen of she United States and citizen and resident of the State of Oregon an attorney of the company, and authorizes service of process to be made upon him, &c.

The bank had never complied with these sections, and the Supreme Court of Oregon held the note void.

It followed the case *In re* Comstock, 3 Sawyer, 218, and said that it presented the same question that was decided in that case.

These are all the cases cited by counsel for defendant in error which were not cited in my brief.

It will readily be seen by this Court that none of them present the question made in the case at bar.

Not one of them is founded upon a statute or upon facts like the present. Not one of them holds that a single transaction is doing business within the meaning of the respective statutes.

I do not claim that a contract which is prohibited by statute is not void, although no penalty is prescribed in the act.

What I claim is that a single act is not "carrying on business" within the fair meaning of the law, and that the words "any business" should not be confined to the strict, literal meaning of the words, but should receive a reasonable and sensible construction. *Qui hæret in litera, hæret in cortice.*

A contract made in Ohio to manufacture an engine and send it to Colorado is, in one sense, doing business in the latter State.

The institution in Colorado of negotiation for a contract which should be finally concluded in Ohio, would be doing "any business" in Colorado, because preliminary treaty is one of the necessary steps before final agreement, and yet I suppose no one would claim that this was "carrying on business" within the purview of the statute. It would be within the letter, but far, very far, from the spirit of the law.

Counsel for defendants becomes facetious when he refers to my illustration of the sale of a valuable

diamond. I put that case for the purpose of showing that it was never intended by the law-makers to prohibit a single contract made in reference to a matter entirely foreign to the regular business of the corporation, and yet the making of such a contract would be "carrying on business," if the construction of my adversary is to prevail.

I cannot quite agree with my learned brother in his suggestion that the guilty corporation might disavow its contract, and sue in assumpsit for the value of the diamond. That would be an easy way of avoiding the consequences denounced against it.

I do, however, take pleasure in being able to agree with him when he says that the terms of a statute should be liberally construed, and quotes an authority in support of that proposition.

Respectfully submitted,

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